

Mandatory Minimum Entrenchment and the Controlled Substances Act

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ABSTRACT

Since their enactment in the mid-1980s, mandatory minimum sentencing provisions have been a prominent feature of the Controlled Substances Act. Observers argue that these mandatory minimum provisions generate unjustifiably harsh sentences for many federal criminal defendants convicted of drug offenses and significantly contribute to racial inequality in the federal criminal system. This essay describes another important characteristic of these mandatory minimums—their reach beyond cases in which they are actually charged. I call this phenomenon and its attendant institutional framework mandatory minimum entrenchment. Rather than conceptualizing mandatory minimums as a binary component of a defendant’s case that either applies or does not, I argue it is more realistic to confront mandatory minimums as a primary element in a larger sentencing framework.

This essay first describes the emergence of mandatory minimums, which Congress added to the Controlled Substances Act roughly fifteen years after its passage. Part II describes how mandatory minimums were hastily created in response to political and public pressure. Part III explains how mandatory minimums then became entrenched in federal sentencing of defendants convicted of drug offenses. Entrenchment flourished as the mandatory minimums for drug offenses influenced the U.S. Sentencing Commission’s drug guidelines, to which prosecutors and judges are formally and behaviorally tethered. Part III then presents a case study that illustrates mandatory minimum entrenchment: showing that sentences for low-level, nonviolent drug defendants remained relatively stable despite a sweeping 2013 policy change that meaningfully reduced mandatory minimum charging in this group. The essay ends in Part IV, which calls on Congress to amend the Controlled Substances Act to either eliminate or reduce its mandatory minimum provisions.

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I. INTRODUCTION

Ranging up to life imprisonment, the mandatory minimum sentencing provisions of the Controlled Substances Act are perhaps the Act's most controversial criminal provisions. These provisions require lengthy sentences for many defendants convicted of drug offenses and are a source of racial disparity within the federal criminal system. Although mandatory minimums appear in some other federal criminal statutes,¹ most mandatory minimums apply to defendants convicted of drug offenses. For example, in fiscal year 2017, defendants convicted of drug offenses comprised roughly 65% of federal defendants who were charged with an offense carrying a mandatory minimum, and, conversely, 44% of federal criminal defendants charged with a drug offense faced a mandatory minimum.²

Mandatory minimums have not always been prevalent in federal drug cases. This essay explores the rapid expansion of mandatory minimums in federal drug trafficking prosecutions and documents the extent to which they have become embedded in federal sentencing. Part II begins by describing how mandatory minimums grew pervasive for federal drug defendants in the late 1980s before a partial retreat in the decades that followed. Part II ends by describing criticisms and defenses of the Act's mandatory minimum provisions and presents figures that depict trends in mandatory minimum charging and sentencing over time.

Part III describes a phenomenon that I call *mandatory minimum entrenchment* and presents a case study that illustrates this phenomenon. Both formal and behavioral aspects of the federal criminal system's prosecution of drug crime generate this entrenchment, which I argue has significant implications for the federal criminal system and its reformers. The first implication is that the harsh effects of mandatory minimums are broader and affect more defendants than previously thought. In other words, mandatory minimums can affect the sentences of defendants for whom a mandatory minimum is not charged or applied. A narrow focus on only those defendants charged with mandatory minimums will overlook many affected defendants. The second, corollary implication is that any reform effort that seeks to undo the harsh effects of mandatory minimums must be more holistic than simply decreasing mandatory minimum charging.

A case study presented in Part III.B illustrates this entrenchment. In August 2013, Attorney General Eric Holder issued a memorandum that instructed all federal

¹ Several other federal crimes include mandatory minimums, including firearm offenses (*see, e.g.*, 18 U.S.C. § 922 (2015)), and sexual offenses involving minors (*see, e.g.*, 18 U.S.C. § 2252(b) (2012)).

² Author's own calculations using the U.S. Sentencing Commission's datafiles. *See* U.S. SENTENCING COMM'N, *Commission Datafiles*, <https://www.ussc.gov/research/datafiles/commission-datafiles> (last visited July 13, 2020) [hereinafter *Commission Datafiles*]. These annual data files contain detailed case information for nearly all defendants sentenced in federal courts in each fiscal year. The data include cases involving felonies and Class A misdemeanors, but not cases involving juvenile defendants, defendants convicted of Class B and Class C misdemeanors, or death penalty cases.

prosecutors to stop charging mandatory minimums in drug cases involving low-level, nonviolent drug defendants.³ As I have shown in other work, prosecutors around the country appeared to comply with the memorandum and charged fewer mandatory minimums in cases against low-level, nonviolent drug defendants following the policy change. Yet, the ultimate *sentences* that eligible defendants received did not meaningfully change, nor did racial disparity in sentencing. Mandatory minimum entrenchment explains this incongruity—namely, interrelated institutional and behavioral elements have connected federal drug sentences to mandatory minimums even when such minimums are not applicable.

The essay ends by arguing in Part IV that Congress must amend the Act to reduce or eliminate its mandatory minimum provisions. Doing so would address the many interconnected ways that mandatory minimums affect drug sentences. Part IV suggests that we should not expect such a shift to usher in an era of wildly disparate sentences across defendants—a concern that motivated the adoption of mandatory minimums into the Controlled Substances Act more than thirty years ago. Unlike the indeterminate sentencing environment in which the mandatory minimums were enacted, eliminating mandatory minimums today would leave intact the entire Guidelines regime.

Part IV then argues that it is extremely likely that Congressional action to reduce or eliminate mandatory minimums would prompt the U.S. Sentencing Commission to promulgate new drug guidelines that are supported by empirical evidence, as it is well-positioned to do.⁴ Without mandatory minimums to which it calibrates the drug guidelines, the U.S. Sentencing Commission would be free to use its unique expertise to ensure that federal sentences are “sufficient, but not greater than necessary, to comply with the purposes” of sentencing.⁵ Eliminating or reducing mandatory minimums would also undercut the prosecutorial practice of

³ Memorandum from Eric Holder, Attorney Gen., U.S. Dep’t of Justice, on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [hereinafter Holder Memo]. Attorney General Jeff Sessions rescinded the Holder Memo on May 10, 2017. See Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep’t of Justice, on Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

⁴ *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007) (“Congress established the Commission to formulate and constantly refine national sentencing standards. Carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national expertise, guided by a professional staff with appropriate expertise.”) (internal quotations omitted).

⁵ 28 U.S.C. § 991 (2008) (directing the U.S. Sentencing Commission to “establish sentencing policies and practices for the Federal criminal justice system that [] assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]”).

using the threat of a mandatory minimum to induce defendants to quickly plead guilty or provide assistance to the government.

II. MANDATORY MINIMUMS IN THE CONTROLLED SUBSTANCES ACT

The Controlled Substances Act criminalizes the manufacture, distribution, or dispensation of illegal drugs, as well the possession of drugs with intent to manufacture, distribute, or dispense them.⁶ The Act sets mandatory minimum sentences based on the quantity and type of drugs involved in the offense, while also accounting for whether the offense resulted in death or serious bodily injury, and the extent of the defendant's past criminal record.⁷ This part broadly describes the adoption of mandatory minimum penalties in the Act in the 1980s, how they have been applied in the years since, and the intense public debate that mandatory minimums have generated over the last 35 years. From this history, a few points become clear. First, the mandatory minimum provisions of the Controlled Substances Act were created hastily, with little empirical basis. In the years that followed, public opinion toward mandatory minimums reversed direction and many lawmakers admitted that the provisions were a mistake. As I describe in Part III *infra*, this early punitiveness has far-reaching consequences for all defendants charged with drug offenses.

A. The Introduction of Mandatory Minimums into the Controlled Substances Act

The Controlled Substances Act was originally enacted as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the "1970 Act").⁸ The 1970 Act reflected a "hybrid law-enforcement and public-health approach to drug policy."⁹ For example, Congress listed the purposes of the 1970 Act as

⁶ 21 U.S.C. § 841 (2018). The Act also criminalizes simple possession under 21 U.S.C. § 844. Most federal drug prosecutions involve drug trafficking offenses rather than simple possession. For example, in fiscal year 2017, just six percent of defendants convicted of drug offenses were convicted of simple possession. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-14 (22d ed. 2017) (Table 3 reporting 1,301 out of 20,607 defendants convicted of a drug offense were convicted of simple possession).

⁷ 21 U.S.C. § 841(b)(1)(A) (2018) (mandatory minimums for drug trafficking offenses). Between 1986 and 2010, some possession offenses carried mandatory minimums of up to 90 days. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1052, 100 Stat. 3207, 3207-08 (1986) [hereinafter 1986 Act] (creating mandatory minimum of fifteen and ninety days of imprisonment for defendants who are convicted of simple possession under 21 U.S.C. § 844 and have one or more prior drug convictions, respectively); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 3, 124 Stat. 2371, 2372 (2010) [hereinafter Fair Sentencing Act] (eliminating the mandatory minimum provisions for simple possession).

⁸ Comprehensive Drug Abuse Prevention and Control Act, Pub. L. No. 91-513, tit. II, § 404, 84 Stat. 1236, 1264-65 (1970) [hereinafter 1970 Act].

⁹ David T. Courtwright, *The Controlled Substances Act: How a "Big Tent" Reform Became a Punitive Drug Law*, 76 DRUG & ALCOHOL DEPENDENCE 9, 10 (2004); *see also* ERICH GOODE, DRUGS IN AMERICAN SOCIETY 165 (2005) ("[President] Nixon was the only recent

providing “increased research into, and prevention of, drug abuse and drug dependence”; providing for “treatment and rehabilitation of drug abusers and drug dependent persons” and, lastly, strengthening “existing law enforcement authority.”¹⁰ The 1970 Act *repealed* nearly all mandatory minimum penalties that were contained in the Act’s predecessor statute, the Narcotic Drugs Import and Export Act.¹¹ As the U.S. Sentencing Commission has described, at the time the 1970 Act was passed, mandatory minimum penalties for drug offenses had grown “increasingly unpopular” among lawmakers and the public.¹² The 1970 Act only included a narrow mandatory minimum provision for drug offenses involving continuing criminal enterprises.¹³

Beginning in the mid-1980s, however, the politics of federal drug law and policy began to change as Congress adopted a more punitive approach to drugs as part of the Tough on Crime era. As this section will describe, the federal approach to drug crime in the late 1980s involved three defining characteristics: the adoption of severe mandatory minimums that would ultimately reach many defendants convicted of drug crimes, the perpetuation of racial disparity in federal prosecutions of drug offenses, and the increased power of prosecutors.

Congress first tested the waters in 1984 with a narrow mandatory minimum provision requiring a three-year minimum sentence for a person convicted of distributing a controlled substance in or near a school if the person had a previous drug conviction.¹⁴ The bulk of mandatory minimum provisions were added to the Controlled Substances Act two years later, when Congress passed the Anti-Drug Abuse Act of 1986 (“the 1986 Act”).¹⁵ The 1986 Act created the vast, overarching structure of mandatory minimum penalties for federal drug trafficking offenses that has endured, largely unchanged, to present-day. Specifically, the 1986 Act created mandatory five- and ten-year minimum terms of imprisonment for offenses involving certain quantities of heroin, cocaine, phencyclidine (PCP), lysergic acid diethylamide (LSD); fentanyl; and marijuana.¹⁶ The 1986 Act also established

president whose record reflected a stronger domestic commitment to rehabilitation and treatment than to enforcement.”).

¹⁰ 1970 Act, *supra* note 8, 84 Stat. at 1236.

¹¹ *Id.*, 84 Stat. at 1291–92.

¹² U.S. SENTENCING COMM’N, OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

¹³ 1970 Act, *supra* note 8, 84 Stat. at 1265.

¹⁴ H.R.J. Res. 648, Pub. L. No. 98-473, § 405A, 98 Stat. 1837, 2069 (1984).

¹⁵ 1986 Act, *supra* note 7, 100 Stat. 3207.

¹⁶ *Id.*, 100 Stat. at 3207-2-3. The triggering quantities for a five-year mandatory minimum were: 100 grams (heroin); 500 grams (cocaine); 5 grams (cocaine base); 10 grams (PCP); 1 gram (LSD); 40

increased mandatory minimum penalties if the offense caused serious physical harm or if the defendant had prior drug convictions.¹⁷

The 1986 Act's aggressive mandatory minimum penalties were a response to the historical moment. During the 1980s, lawmakers came to view the national crack cocaine epidemic as a significant social and public health crisis. Crack cocaine—a popular form of cocaine base¹⁸—spread throughout the United States in the 1980s.¹⁹ By the mid-1980s, the crack cocaine epidemic generated much sensationalist media coverage²⁰ and nearly universal public concern.²¹ This public understanding of the epidemic was explicitly racialized. As Professor LaJuana Davis explains, “[d]rug abuse in the United States has been ‘popularly understood as a black problem,’ and blacks and cocaine have historically been connected.”²² The problem was brought

grams (fentanyl); 100 kilograms (marijuana). The triggering quantities for a ten-year mandatory minimum were: 1 kilogram (heroin); 5 kilograms (cocaine); 50 grams (cocaine base); 100 grams (PCP); 10 grams (LSD); 400 grams (fentanyl); 1000 kilograms (marijuana).

¹⁷ *Id.*

¹⁸ “Cocaine base” is the statutory term that encompasses crack cocaine. Cocaine base, or, “cocaine in its base form” includes “the cocaine in coca paste, crack cocaine, and freebase.” DePierre v. United States, 564 U.S. 70, 74 (2011) (holding that the term “cocaine base” in the Controlled Substances Act is “cocaine in its base form”). In contrast, powder cocaine is chemically different because it is cocaine in its salt form (cocaine hydrochloride). *Id.*

¹⁹ The rise in cocaine use was due in part to the fact that crack cocaine is relatively easy to produce using powder cocaine, baking soda, and water, and available to purchase in small, inexpensive quantities that could be smoked (rather than snorted or injected), which appeals to users. LaJuana Davis, *Rock, Powder, Sentencing—Making Disparate Impact Evidence Relevant in Crack Cocaine Sentencing*, 14 J. GENDER, RACE & JUST. 375, 378–79 (2011).

²⁰ As one scholar described a few years after the 1986 Act's passage, “In spite of [crack cocaine's] recent explosion in use, the extent of its use has nonetheless been greatly exaggerated by the media.” GOODE, *supra* note 9, DRUGS IN AMERICAN SOCIETY (9th ed. 2014).

²¹ JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 158 (2017) (“At the height of the epidemic, black political and civic leaders often compared crack to the greatest evils that African Americans had ever suffered.”); Jennifer Robison, *Decades of Drug Use: The ‘80s and ‘90s*, GALLUP, (July 9, 2002), <https://news.gallup.com/poll/6352/decades-drug-use-80s-90s.aspx> (reporting that in 1986, Americans reported that “crack” and “other forms of cocaine” beat “alcohol abuse” in a survey question that asked Americans, “Which one of the following do you think is the MOST serious problem for society today?”) Peter Kerr, *Anatomy of the Drug Issue: How, After Years, It Erupted*, N.Y. TIMES (Nov. 17, 1986), <https://www.nytimes.com/1986/11/17/us/anatomy-of-the-drug-issue-how-after-years-it-erupted.html> (noting that although “statistics showed no sudden rise in drug use,” America, in 1986 “erupted with concern about illegal drugs”).

²² Davis, *supra* note 19 at 376 (quoting David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1292 (1995)). In contrast, Congress's approach to the recent opioid crisis has been markedly different. Jelani Jefferson Exum, *From Warfare to Welfare: Rethinking the Purposes of Sentencing During the Opioid Crisis*, 67 U. Kan. L. Rev. 941, 942 (“Now that the drug emergency is portrayed as destroying wholesome American communities—as opposed to poor, crime-ridden communities of color—the tone has changed from punishment toward treatment and rehabilitation.”).

into sharper public view when two high-profile athletes died from cocaine overdoses within eight days of each other in 1986. On June 19, 1986, 22-year-old college basketball player Leonard Kevin “Len” Bias died of a cocaine overdose just two days after being drafted second in the NBA draft by the Boston Celtics.²³ A rumor spread through the press that Bias—who was Black—died while smoking crack cocaine; in fact, his overdose was caused by powder cocaine.²⁴ Eight days later, another Black athlete, Donald Rogers of the Cleveland Browns football team, also died from a cocaine overdose on the day before his wedding.²⁵ In 1986, media coverage of the crack cocaine epidemic skyrocketed.²⁶

The 1986 Act thus passed in the midst of what scholars have described as a “panic”²⁷ and a “frenzy”²⁸ over the rise of crack cocaine use in the U.S. population, despite the fact that the vast majority of cocaine users at that time reported using powder cocaine.²⁹ The 1986 Act was introduced by Rep. James Wright, Jr. on September 8, 1986.³⁰ It passed quickly and nearly unanimously in both chambers of

²³ Keith Harriston & Sally Jenkins, *Maryland Basketball Star Len Bias is Dead at 22*, WASH. POST, June 20, 1986, <https://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm>.

²⁴ Davis, *supra* note 19 at 381 n.32; Adam M. Acosta, *Len Bias’ Death Still Haunts Crack-Cocaine Offenders After Twenty Years: Failing to Reduce Disproportionate Crack-Cocaine Sentences Under 18 U.S.C. § 3582*, 53 HOW. L. J. 825, 827 n.4 (2010); Jon Schuppe, *30 Years After Basketball Star Len Bias’ Death, Its Drug War Impact Endures*, NBC NEWS (June 19, 2016), <https://www.nbcnews.com/news/us-news/30-years-after-basketball-star-len-bias-death-its-drug-n593731>.

²⁵ Steve Geissinger, *The Death by Cocaine Overdose of Cleveland Browns Star Don Rogers*, ASSOCIATED PRESS, (July 5, 1986), <https://apnews.com/ba448cb5f70f0e72f1b1255480c98c94>.

²⁶ See Spencer A. Stone, *Federal Drug Sentencing—What was Congress Smoking? The Uncertain Distinction between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 311–12 (2007) (noting that NBC News ran 400 reports on crack in the months before the passage of the 1986 Act); KENNETH J. MEIER, *THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY*, 51 (Routledge 1994) (finding a six-fold increase in news coverage between 1985 and 1986).

²⁷ Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J. L. & PUB. POL’Y 241, 241 (2014).

²⁸ Keith M. Kilty & Alfred Joseph, *Institutional Racism and Sentencing Disparities for Cocaine Possession*, 4 J. POVERTY 1, 2 (1999).

²⁹ NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: HIGHLIGHTS 1988 8 (1990), <https://www.ncjrs.gov/pdffiles1/Digitization/131341NCJRS.pdf> (Figure 1 showing that crack cocaine use constitutes a small fraction of total cocaine use).

³⁰ 1986 Act, *supra* note 7, 100 Stat. 3207

Congress³¹ at a time when Republicans controlled the presidency and the U.S. Senate, but Democrats controlled the U.S. House of Representatives.

The 1986 Act was passed without any hearings or input from the federal judiciary, the Department of Justice, the Drug Enforcement Agency, the Bureau of Prisons, defense attorneys, advocates, or defendants convicted of drug offenses.³² Floor debate was largely agreeable because few lawmakers objected to the bill.³³ Many observers attribute the 1986 Act's hurried passage to a confluence of factors—growing concern about the dangers of crack cocaine, the deaths of Bias and Johnson, and political urgency on the part of then-Speaker of the House of Representatives Thomas Phillip “Tip” O’Neill to win back control of the Senate in the 1986 midterm elections.³⁴ President Ronald Reagan signed the bill into law on October 27, 1986.³⁵ Exactly one week later, Democrats went on to net eight Senate seats—enough for a 55-45 majority.³⁶

Notably, Congress chose a criminal law approach to the cocaine epidemic, rather than the public health approach originally championed in the 1970 Act.³⁷ Lawmakers repeatedly emphasized, however, that the 1986 Act's mandatory minimum provisions were designed to harshly punish serious drug traffickers rather than lower-level drug users and sellers.³⁸ The 1986 Act's ability to narrowly target the most serious drug “kingpins” however, was undermined by one of its most

³¹ Record Vote No. 378, 99th Cong., Sept. 11, 1986 (Yea-Nay vote 392-16 in the House of Representatives); Record Vote No. 302, 99th Cong., Sept. 30, 1986 (Yea-Nay vote 97-2 in the Senate).

³² John Arit, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983> (quoting Eric Sterling).

³³ See *supra* note 31 (1986 Act passed nearly unanimously in both chambers).

³⁴ Jonathan Easley, *The Day the Drug War Really Started*, SALON (June 20, 2011), https://www.salon.com/2011/06/19/len_bias_cocaine_tragedy_still_affecting_us_drug_law/.

³⁵ 1986 Act, *supra* note 7, 100 Stat. 3207.

³⁶ E.J. Dionne Jr., *Democrats Rejoice at 55-45 Senate Margin But Still Seek Agenda to Counter Reagan; Big Political Shift*, N.Y. TIMES (Nov. 6, 1986), <https://www.nytimes.com/1986/11/06/us/democrats-rejoice-55-45-senate-margin-but-still-look-for-agenda-counter-reagan-big.html>.

³⁷ MICHELLE ALEXANDER, THE NEW JIM CROW 49–50 (2012) (“Practically overnight the budgets of federal law enforcement soared By contrast, funding for agencies responsible for drug treatment, prevention, and education was dramatically reduced.”). For a comparison of how Congress’s treatment of the cocaine epidemic compares to the recent opioid epidemic, see generally Exum, *supra* note 22.

³⁸ See, e.g., 132 CONG. REC. 27188 at 21788 (1986) (statement of Sen. Leahy) (“These [mandatory minimum] penalties are appropriately aimed at the drug kingpins.”); *id.* at 27193–4 (1986) (statement of Sen. Byrd) (“For the kingpins—the masterminds who are really running these operations . . . we require a jail term upon conviction Our proposal would also provide mandatory minimum penalties for the middle-level dealers as well”); *id.* at 22697 (statement of Rep. Roukema) (supporting the 1986 Act because it “provides stiff mandatory penalties for large-scale drug trafficking”).

destructive provisions: a 100:1 disparity in the quantity of cocaine base relative to powder cocaine necessary to trigger the Act's mandatory minimum penalties.³⁹ Under the 1986 Act, for a given quantity of cocaine base, a person would need to possess 100 times that quantity of powder cocaine to trigger the same mandatory minimum. Because the majority of people convicted of possessing powder cocaine are White and the majority of people convicted of possessing cocaine base are Black,⁴⁰ the 100:1 rule generated massive racial disparity in incarceration for federal drug offenses, a problem the U.S. Supreme Court discussed at length in *Kimbrough v. United States*.⁴¹

The 100:1 disparity survived several constitutional challenges, as courts repeatedly held that Congress had a rational basis for treating drug crimes involving cocaine base more harshly than those involving powder cocaine.⁴² Further exacerbating racial disparity two years later, Congress enacted a five-year mandatory minimum penalty for simple possession of five grams or more of cocaine base.⁴³ Cocaine base was the only controlled substance for which a mandatory minimum attached to simple possession. For all other controlled substances, including powder cocaine, the statutory *maximum* sentence for simple possession was no more than three years of imprisonment.⁴⁴

Reflecting the view that one benefit of mandatory minimums is that they induce defendants to cooperate with prosecutors, the 1986 Act also created an exception that allowed defendants to receive sentences below their mandatory minimum if they provide substantial assistance to the government.⁴⁵ Under this provision, a judge may sentence a defendant to a reduced sentence, including a sentence below the mandatory minimum, "upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."⁴⁶ Many drug defendants rely on this provision to receive sentences below the mandatory minimum.

³⁹ 1986 Act, *supra* note 7.

⁴⁰ In fiscal year 2016, for example, among federal drug defendants to whom just one type of drug was attributed, 65 percent of powder cocaine defendants were white, and 84 percent of crack cocaine defendants were Black.

⁴¹ *Kimrough v. United States*, 552 U.S. 85, 98–99 (2007).

⁴² CHARLES DOYLE, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES, CONG. RES. SERV. REPORT NO. R45074 at 38–39 n. 295 (listing cases).

⁴³ Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370 (1988) [hereinafter 1988 Act].

⁴⁴ See 1986 Act, *supra* note 7, 100 Stat. at 3207–8 (statutory maximums for possession offenses ranged between one and three years depending on the defendant's criminal record).

⁴⁵ 18 U.S.C. § 3553(e) (1986); 1986 Act, *supra* note 7, 100 Stat. at 3207.

⁴⁶ *Id.*

B. *Mandatory Minimums in the 1990s through 2010s: A Partial Retreat*

Almost immediately after the 1986 Act was passed, advocates, scholars, legislators, and civil servants sounded the alarm that the Act's mandatory minimum provisions led to harsh and racially disparate sentences, particularly for low-level defendants, who Congress had not intended to be affected by mandatory minimums.⁴⁷ After a concerted lobbying effort, Congress created another mechanism through which certain low-level drug defendants could obtain relief from an otherwise applicable mandatory minimum at sentencing: the safety-valve. The safety-valve provision was part of the Violent Crime Control and Law Enforcement Act of 1994 (popularly called the "1994 Crime Bill").⁴⁸ A person is eligible for relief under the safety-valve provision—meaning they can be sentenced below their mandatory minimum—if they satisfy five criteria.⁴⁹ First, the person must have minimal criminal history.⁵⁰ Second, they must not have used violence in the commission of the offense and, third, the offense must not have resulted in a serious injury.⁵¹ Fourth, they must not have been a leader, organizer, or supervisor in the offense.⁵² Finally, the defendant must make a proffer that the government accepts as true of all that they know about the offense.⁵³ While the safety-valve provided relief to some low-level drug defendants, its strict requirements leave many federal drug defendants ineligible.

In 2010, Congress reduced the 100:1 crack-powder disparity that persisted for more than twenty years despite forceful criticism of its racially disproportionate impact.⁵⁴ The Fair Sentencing Act of 2010 did so by increasing the threshold

⁴⁷ See, e.g., Marvin D. Free, *The Impact of Federal Sentencing Reforms on African Americans*, 28 J. BLACK STUD. 268, 269–70 (1997); U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 33 (2011) (finding that the five- and ten-year mandatory minimum penalties often apply to offenders who perform relatively low-level functions, despite Congress's intent to limit those mandatory minimums to serious or major traffickers).

⁴⁸ Pub. L. No. 103-322, tit. VIII, § 80001, 108 Stat. 1796, 1985–86 (1994).

⁴⁹ 18 U.S.C. § 3553(f) (1986).

⁵⁰ From the creation of the safety valve until December 2018, the Act limited the safety valve to defendants who do "not have more than 1 criminal history point." The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018) expanded safety valve eligibility to include defendants who do "not have: (A) more than four criminal history points, excluding any criminal history points resulting from a 1-point offense . . . ; (B) a prior 3-point offense . . . ; and (C) a prior 2-point violent offense."

⁵¹ *Id.* § 3553(f)(2)–(3).

⁵² *Id.* § 3553(f)(4).

⁵³ *Id.* § 3553(f)(5).

⁵⁴ See generally, e.g., Davis, *supra* note 19; Sklansky, *supra* note **Error! Bookmark not defined.**; DORIS MARIE PROVINE, UNEQUAL UNDER LAW; RACE IN THE WAR ON DRUGS (2008); Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time to Restore the Balance*, 16 FED. SENTENCING REP. 87 (2003); William Spade, Jr., *Beyond*

quantities of cocaine base necessary to trigger mandatory minimums, which reduced the disparity to 18:1—the ratio that remains in place today.⁵⁵ The Fair Sentencing Act also eliminated the five-year mandatory minimum for simple possession of crack cocaine.⁵⁶ Although the Fair Sentencing Act represents important progress toward reducing racial disparities in federal drug prosecutions, it left intact the mandatory minimum architecture that characterizes these cases. It also left unchanged the mandatory minimums for all drug-trafficking offenses involving substances other than cocaine base.

C. *The Continuing Debate over Mandatory Minimums*

As described in the Part II.A, *supra*, mandatory minimum penalties were widely popular when Congress passed the 1986 Act. In the decades that have followed, public opinion has sharply reversed course. In 2016, nearly 80 percent of Americans favored ending mandatory minimum sentences for drug offenses.⁵⁷ This section begins by describing the main arguments made in support of mandatory minimums: that they deter, that they create uniformity in sentencing, that they express societal outrage, that they incapacitate, and that they are an important prosecutorial tool. After cataloging the reasons upon which mandatory minimums have been traditionally justified, subsection II.C.2 describes the grounds upon which mandatory minimums are most frequently attacked: their extraordinary harshness, their exacerbation of racial disparity, and the uneven bargaining dynamics that they promote between defendants and prosecutors.

the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy, 38 ARIZ. L. REV. 1233 (1996) *see also* Editorial, *100-to-1 Rule*, N.Y. TIMES (Nov. 15, 2007), <https://www.nytimes.com/2007/11/15/opinion/15thu3.html>.

⁵⁵ Fair Sentencing Act, *supra* note 7, at 2372 § 2. The 18:1 ratio does not appear to have a scientific justification—rather, it was a compromise reached between Senator Dick Durbin, Democrat of Illinois (who preferred a lower ratio) and Senator Jeff Sessions, Republican of Alabama (who preferred a larger ratio). The 18:1 ratio compromise earned bipartisan support. Adam Liptak, *Judges See Sentencing Injustice, but the Calendar Disagrees*, N.Y. TIMES, Apr. 18, 2011. Until 2018, the Fair Sentencing Act did not apply retroactively to prisoners serving sentences for drug offenses involving crack cocaine who were sentenced prior to the law. In 2018, the First Step Act, *supra* note 50, applied the Fair Sentencing Act retroactively to prisoners still serving such sentences.

⁵⁶ This mandatory minimum had been added in the 1988 Act. Crack cocaine was the only controlled substance for which a mandatory minimum attached to simple possession. *See* Kimbrough v. United States, 552 U.S. 85 (2007).

⁵⁷ *Voters Want Big Changes in Federal Sentencing, Prison System*, PEW (Feb. 12, 2016), <https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system>.

1. Support for Mandatory Minimums

Proponents of mandatory minimum penalties for drug offenses articulate several reasons for their support. First, mandatory minimums traditionally have been justified as serving an important deterrent function. Because mandatory minimums offer certainty of punishment upon conviction, the argument goes, they will be more effective at deterring criminal behavior than indeterminate sentencing regimes.⁵⁸ Thus, many proponents believe that mandatory minimums are necessary to discourage violations of our nation's drug laws.

In floor debate over the House bill that would be enacted as the 1986 Act, members of both political parties articulated deterrence rationales for mandatory minimums.⁵⁹ In the Senate, Senator Byrd, Democrat of West Virginia, made this view clear, saying, "[T]he convicted defendant must—I repeat, must—be sentenced to the penitentiary [T]he law also will make it clear exactly the minimum number of years he must stay there. So, these would-be criminals will know that in advance, as well."⁶⁰

Second, many supporters of mandatory minimums in the 1986 Act believed the provisions would create uniformity in federal sentencing by limiting judicial discretion. In the late 1980s, much of the American public viewed the courts as too easy on criminal defendants.⁶¹ Moreover, many lawmakers believed that indeterminate sentencing regimes led to widely disparate sentences being imposed across defendants convicted of the same criminal offense. Mandatory minimums were thought to rein in this disparity by imposing more uniformity on sentences.

Third, many proponents conceptualize mandatory minimums in expressive terms. For example, in a 1999 debate over the merits of mandatory minimums, then-Representative Asa Hutchinson, Republican of Arkansas, argued that mandatory minimums are justified because they express *society outrage* at drug use and

⁵⁸ See, e.g., Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 187, 192 (1993) (arguing that prior to 1984, criminal sentencing "lacked the certainty necessary to inspire public confidence and operate as a meaningful deterrent to crime" and that mandatory minimums were one approach to achieving deterrence).

⁵⁹ See, e.g., 132 CONG. REC. 22731 (1986) (statement of Rep. Lehman) (explaining that the mandatory minimum provisions were designed "to deter the would-be drug trafficker from getting involved in drug trafficking and [to] penalize those who are continuing to make drugs available on the streets"); *id.* at H22669 (statement of Rep. Wolf) ("We must also let drug traffickers know that their illegal actions will be severely punished an the bill's provisions to stiffen penalties for drug offenders, including establishing minimum mandatory 5- and 10-year prison terms for major drug trafficking, are critical").

⁶⁰ 132 CONG. REC. 27193 (1986) (statement of Sen. Byrd).

⁶¹ See, e.g., Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, 14 L. & HUMAN BEH. 199, 199 (1990) ("In public opinion polls, a substantial proportion of lay respondents report that judges are too lenient.").

trafficking.⁶² Rep. Hutchinson argued that mandatory minimums are an expression of societal outrage at the proliferation of illegal drugs. This proliferation, he argued, “destroys families and wrecks the lives of individuals each year. And so, it’s reasonable for society to express its outrage and to take action to confront this problem, both in terms of firearms and in terms of drugs.”⁶³

Rep. Hutchinson’s remarks also echo 1980s-era incapacitation-based arguments that lengthy mandatory minimum sentences for drug trafficking are justified because they protect vulnerable young people from the dangers of drug use (especially crack cocaine use) and the violence with which it is associated.⁶⁴ Some have argued that judges and even prosecutors are (or were) not sensitive enough to these harms. For example, during floor debate on the 1986 Act, Senator Pete Domenici, Republican of New Mexico, predicted, “when prosecutors stop viewing drug cases as a low priority, and when judges stop viewing the possession of small amounts of drugs as a ‘victimless crime,’ then we will be achieving a fundamental change in attitudes that will lead to a decrease in drug usage.”⁶⁵

Fourth, mandatory minimums are powerful tools for prosecutors. Prosecutors are the gatekeepers of mandatory minimum penalties because they can choose whether to file charges that trigger mandatory minimums. Thus, mandatory minimums can induce defendants to cooperate with the government in order to avoid a lengthy mandatory minimum.⁶⁶ Mandatory minimums also help prosecutors obtain guilty pleas, although, as the U.S. Sentencing Commission has pointed out, policymakers usually do not publicly voice this rationale when defending mandatory minimums.⁶⁷

⁶² Stanley Sporkin & Asa Hutchinson, Debate Moderated by Cokie Roberts, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1282 (1999). Hutchinson is now the governor of Arkansas.

⁶³ *Id.* at 1283. Others have denounced this rationale. See, e.g., Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 67 (arguing that the outrage justification “has no place in a society that takes human rights seriously”).

⁶⁴ See Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2546 (2010).

⁶⁵ 132 CONG. REC. 27175 (1986) (statement of Sen. Domenici).

⁶⁶ There are two statutory provisions that allow a defendant to be sentenced below the mandatory minimum—the substantial assistance provision, 18 U.S.C. § 3553(e), and the safety-valve provision, 18 U.S.C. § 3553(f). Both provisions require a defendant to cooperate with the government—either by providing information that can help the government bring a case against someone else (substantial assistance) or by proffering to the government everything the person knows about the offense (safety valve).

⁶⁷ U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEMS 14–15 (1991), <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory->

At the time the 1986 Act was passed, many lawmakers viewed mandatory minimums as an important and justified prosecutorial tool. For example, in floor debate, Senator Lawton Chiles, Democrat of Florida, argued that mandatory minimums “help our law enforcement officials by strengthening criminal penalties for drugs like crack cocaine. This is an absolutely essential first step. Current law makes it very difficult to arrest and convict crack dealers.”⁶⁸ Although many lawmakers justified mandatory minimums based on their prosecutorial potential, others argue that these bargaining dynamics deserve criticism. This and other criticisms of mandatory minimums are described in the next subsection.

2. Criticisms of Mandatory Minimums

Mandatory minimums for drug offenses have long generated condemnation. Most criticism falls into one of three broad categories. First, rather than expressing the public’s outrage at drug crime, many view mandatory minimums as overly harsh. Mandatory minimums for illegal drug trafficking are extremely punitive. They range from five years to life in prison. This punitiveness is particularly acute in the context of drug crimes because drug offenses are often charged as conspiracies in which the quantity of drugs involved are attributed to *all* members of the conspiracy, including minor participants. As a result, harsh mandatory minimums can reach defendants who operated at low levels of the conspiracy, subverting the legislative intent of the 1986 Act.⁶⁹ This problem is especially grave because low-level participants often are unable to receive substantial assistance reductions if they do not have enough information about people who are higher up in the conspiracy, leading to what scholars have called the “cooperation paradox.”⁷⁰

minimum-penalties/1991_Mand_Min_Report.pdf[hereinafter 1991 REPORT] (“Although infrequently cited by policymakers, prosecutors express the view that mandatory minimum sentences can be valuable tools in obtaining guilty pleas, saving scarce enforcement resources and increasing the certainty of at least some measure of punishment. In this context, the value of a mandatory minimum sentence lies not in its imposition, but in its value as a bargaining chip to be given away in return for the resource-saving plea from the defendant to a more leniently sanctioned charge.”).

⁶⁸ 132 CONG. REC. 26447 (1986) (statement of Sen. Chiles).

⁶⁹ See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (“Normal principles holding defendants accountable for the acts of their co-conspirators, even if carefully applied, can leave low-level dealers, middlemen and more important distributors responsible for the same quantity of drugs flowing through the conspiratorial network.”); see also Neal K. Katyal, *Conspiracy Theory*, 112 YALE L. J. 1307 (2003) (providing both moral and utilitarian justifications for using conspiracy law to low-level members of drug trafficking organizations).

⁷⁰ See Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1863–64 (1995); Schulhofer, *supra* note 69.; Shana Knizhnik, Note, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator’s Dilemma*, 90 N.Y.U. L. REV. 1722, 1726 (2015).

Federal judges are among those who consider drug mandatory minimums to be excessively severe. A 2010 survey found that 62 percent of federal district judges felt that mandatory minimums were too harsh.⁷¹ Roughly half of all federal drug defendants receive a sentence below their recommended Guidelines range—a higher rate of below-Guidelines sentencing than in any other major offense category.⁷² Nor is it unusual for a federal district judge to sentence a defendant to the mandatory minimum while lamenting their powerlessness to reduce the sentence further to one the judge would find appropriate.⁷³ The safety-valve exception was meant to address this problem, but it is a blunt instrument with which to grant mercy. Given its strict requirements, there are likely to be many people who will not qualify for the safety valve but for whom a mandatory minimum sentence is still too harsh. Low-level defendants might also voluntarily opt out of safety-valve relief if they do not want to proffer to the government, perhaps because they fear retaliation for doing so.⁷⁴

Second, rather than equalizing sentences, as proponents argue, mandatory minimums disproportionately affect people of color, especially Black defendants. For example, Professors M. Marit Rehavi and Sonja Starr have found that prosecutors are more likely to charge crimes carrying a mandatory minimum when the defendant is Black.⁷⁵ This charging disparity appears to have heightened in response to increased judicial discretion in the wake of the U.S. Supreme Court's 2005 decision in *United States v. Booker*.⁷⁶ A new paper by Cody Tuttle also finds that prosecutors are more likely to charge mandatory minimum-triggering quantities

⁷¹ U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 5 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf [hereinafter 2010 SURVEY].

⁷² Author's own calculations using the *Commission Datafiles*, *supra* note 2.

⁷³ See, e.g., *United States v. Dossie*, 851 F.Supp.2d 478, 489 (E.D.N.Y. 2012) ("The only reason for the five-year sentence imposed on Dossie is that the law invoked by the prosecutor required it. It was not a just sentence.").

⁷⁴ See, e.g., *United States v. Tang*, 214 F.3d 365, 371 (2d Cir. 2000) ("The [safety valve] statute makes no exception for failure to furnish information because of feared consequences, yet it seems unlikely that Congress was unaware that those with knowledge of narcotics traffic would in some instances have legitimate apprehension about disclosing what they know We see no basis for creating a fear-of-consequences exception to the safety valve provision.").

⁷⁵ See M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014).

⁷⁶ See Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2 (2013); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015); Crystal S. Yang, *Have Interjudge Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268 (2014). A new working paper also documents racial disparities in mandatory minimum charging. Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums* (working paper 2019), http://econweb.umd.edu/~tuttle/files/tuttle_mandatory_minimums.pdf.

of crack cocaine against Black and Hispanic federal defendants, and suggests that racial discrimination is to blame.⁷⁷

The U.S. Sentencing Commission has also long criticized mandatory minimums for the racial disparities they produce. In 1990, Congress posed a series of questions to the Commission about the newly-created mandatory minimums and Sentencing Guidelines. The Commission responded to these inquiries in what appears to be its first report to Congress.⁷⁸ The Commission's second key finding in the 1990 Report was that mandatory minimum sentences appear to be disparately applied in a way that is "related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum"⁷⁹ Despite Congress's view that mandatory minimums would lead to more equal sentences for similarly-situated defendants, the Commission criticized mandatory minimums on the ground that "offenders seemingly not similar nonetheless receive similar sentences," and concluded that "the most efficient and effective way for Congress to exercise its powers to direct sentencing policy is through the established process of sentencing guidelines."⁸⁰

Third, critics have objected that mandatory minimums shift the power dynamics between defendants, prosecutors, judges, and even police officers in detrimental ways.⁸¹ According to the "hydraulic theory" of discretion, mandatory minimums remove discretion from sentencing judges, which transfers power to prosecutors—who have the charging power.⁸² When a defendant is convicted of a crime carrying a mandatory minimum, the judge's hands are tied. Unless one of the two statutory exceptions are available, the sentencing judge has no power to impose a lenient sentence, even if the sentencing judge believes the mandatory minimum sentence is greater than necessary to serve the purposes of punishment. As a result, prosecutors have tremendous influence over the ultimate sentences that drug defendants receive. Moreover, because both the safety-valve and substantial assistance reductions are cooperation-based, prosecutors play a large role in

⁷⁷ Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums* (Oct. 28, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080463.

⁷⁸ See generally 1991 REPORT, *supra* note 67.

⁷⁹ *Id.* at ii.

⁸⁰ *Id.* at ii, iv.

⁸¹ See MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* 121–26 (2016) (describing how federal prosecutors use the threat of 851 enhancements, which increase the mandatory minimums for drug defendants who were previously convicted of a felony drug offense, to induce defendants to plead guilty or provide assistance).

⁸² See Terence D. Miethe, *Charging and Plea Bargaining Practices under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 155–56, (1987) ("[M]ost researchers begin with the assumption that the displacement of discretion exists and then proceed to describe the various adaptive responses to such structural changes.").

deciding whether a defendant has satisfied these provisions. Prosecutors thus have enormous power to induce a defendant to share information with the government, even if doing so is dangerous to the defendant themselves or their family. Some defense attorneys have also argued that mandatory minimums can lead to increased police misconduct.⁸³

Debate over mandatory minimums largely focuses on the provisions themselves—how they are used or threatened in individual cases and their effects in the aggregate. In Part III, I argue that another important aspect of mandatory minimums—and part of what makes them so powerful—is their reach beyond cases in which they are charged.

D. Trends in Mandatory Minimum Charging and Sentencing

This section provides a descriptive account of mandatory minimum charging and sentencing for federal defendants convicted of drug offenses over the last several decades. Figure 1 plots the prevalence, average sentences, and average mandatory minimums for federal drug defendants dating back to the mid-1990s. Figures 2 and 3 plot trends in mandatory minimum charging for federal drug defendants by race and Hispanic ethnicity.⁸⁴ Each Figure includes a vertical line in 2010 to delineate the passage of the Fair Sentencing Act. It is important to note that the Fair Sentencing Act took effect on August 3, 2010—less than two months before the end of fiscal year 2010. Any effects of the Fair Sentencing Act will likely begin to appear in fiscal year 2011—one year past the reference line in Figures 1, 2, and 3.

⁸³ Scott Hechinger, Opinion, *How Mandatory Minimums Enable Police Misconduct*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/opinion/mandatory-minimum-sentencing.html>; Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), <https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.

⁸⁴ I use the term Hispanic because this is the terminology used in the U.S. Sentencing Commission data.

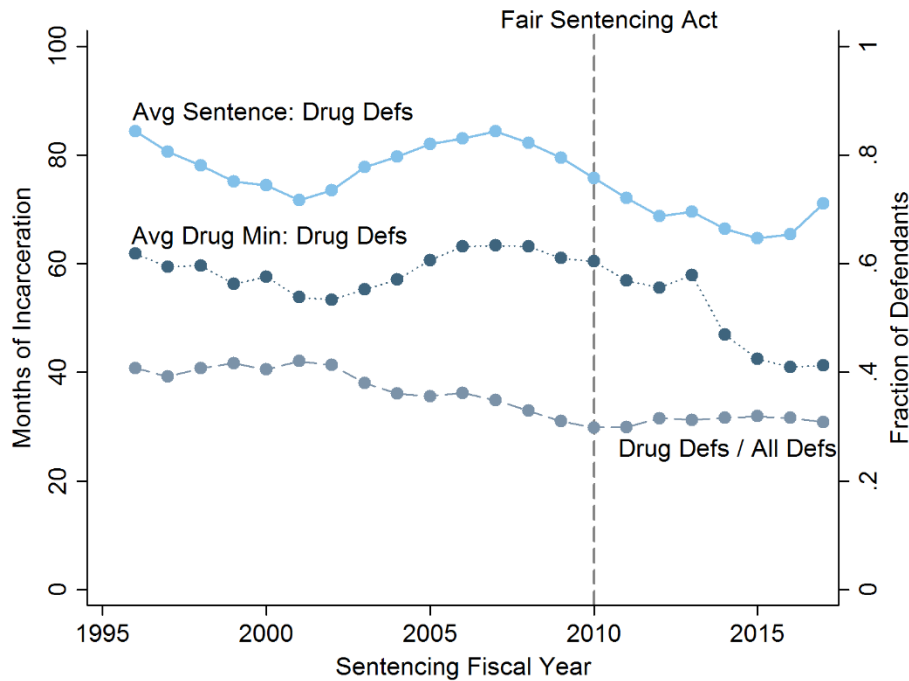


Figure 1. Federal Drug Charging and Sentencing, Over Time

In Figure 1,⁸⁵ the light blue solid line plots the yearly average sentence (in months of incarceration) imposed on all federal defendants who are convicted of drug offenses. It should be read using the left axis. The average sentence for a federal defendant convicted of a drug offense is around eighty months, and appears to move cyclically, increasing in 2002, decreasing in 2008, and increasing again in 2017.⁸⁶ Although sentences for defendants convicted of drug offenses decreased after

⁸⁵ Figure 1 uses data from the annual Sourcebooks of Federal Sentencing Statistics published by the United States Sentencing Commission. See generally U.S. SENTENCING COMM’N, *Sourcebook Archives*, <https://www.ussc.gov/research/sourcebook/archive> (last visited July 13, 2020). In each year after 1996, the number of defendants charged with mandatory minimums, by primary offense type, are reported in Table 43, “Drug Offenders Receiving Mandatory Minimums for Each Drug Type.” In 1996, this information was reported in Table 39, with the same title. Mandatory minimum charging information was aggregated by the author for fiscal years in which the Sourcebooks subdivided the tables due to Supreme Court decisions (2004 and 2005).

⁸⁶ This pattern seems to loosely coincide with changes in the party of the Presidency (roughly decreasing during the Clinton and Obama presidencies and increasing during the George W. Bush and Trump presidencies).

passage of the Fair Sentencing Act, this looks like a continuation of an earlier trend beginning around 2008, which is consistent with other research.⁸⁷

The bottom gray-blue dashed line plots the fraction of all federal defendants who are convicted of drug offenses. It should be read on the right axis. Federal defendants convicted of drug offenses hovered around 40 percent until 2002. Between 2002 and 2010, the share of federal defendants who were convicted of drug offenses steadily declined to around 30 percent, where it has remained. This decreasing trend is likely due to the rise of criminal immigration prosecutions over the period, which diluted the share of drug prosecutions in the federal criminal system.

Finally, the middle dark blue dotted line plots the estimated average mandatory minimum under the Controlled Substances Act for drug defendants. It should be read on the left axis. Defendants charged with drug offenses who had no mandatory minimum are included in the average as zeroes. For the first eighteen years (1996-2013), average mandatory minimums follow a shape that is nearly parallel to the average sentence—which could reasonably lead observers to believe that mandatory minimums are an important determinant of sentence length. However, in 2013 these trends separate, with mandatory minimum charging sharply dropping relative to sentencing. Part III.B, *infra*, explains this separation to be a consequence of mandatory minimum entrenchment.

⁸⁷ David Bjerk, *Mandatory Minimum Policy Reform and the Sentencing of Crack Cocaine Defendants: An Analysis of the Fair Sentencing Act*, 14 J. EMPIRICAL LEGAL STUD. 370, 370 (2017) (finding that the mean sentence length for defendants convicted of drug offenses involving crack cocaine fell beginning around 2007 and continued following the Fair Sentencing Act).

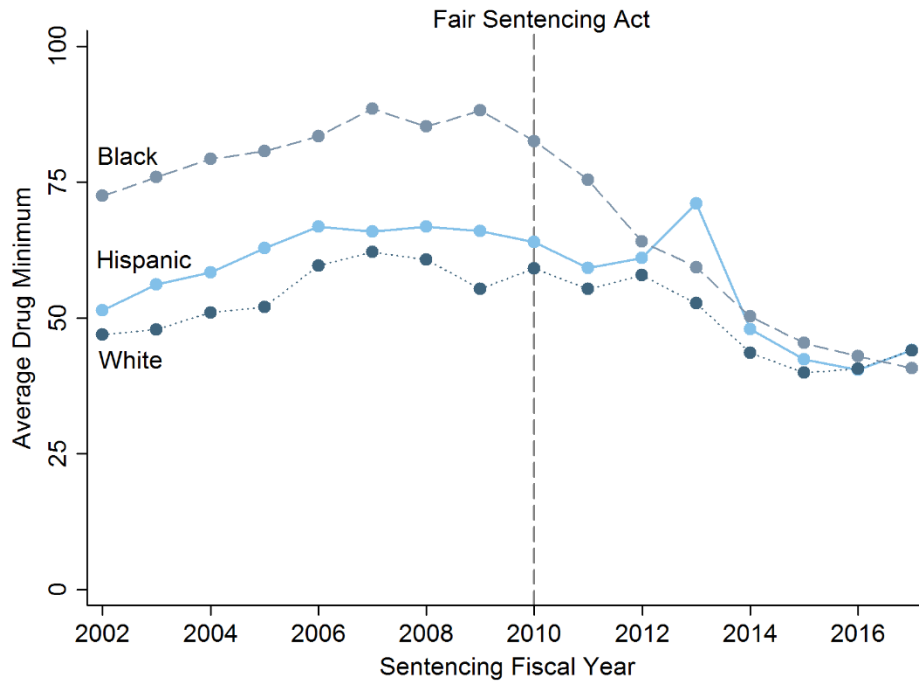


Figure 2. Mandatory Minimum Charging for Federal Drug Defendants, By Defendant Race and Ethnicity

Figure 2 plots the average drug mandatory minimum for Black, Hispanic, and White defendants convicted of federal drug offenses, over time.⁸⁸ Defendants convicted of drug offenses who did not face a mandatory minimum are included in the averages with mandatory minimums equal to zero. Until 2012, Black defendants convicted of drug offenses (top blue-gray dashed line) were subject to larger mandatory minimums than Hispanic and White defendants convicted of drug offenses. In those years, Hispanic and White defendants convicted of drug offenses had roughly equal average statutory minima.

The average mandatory minimums for Black defendants convicted of drug offenses began to fall after 2010—consistent with the Fair Sentencing Act reducing mandatory minimum charging by increasing the quantity of crack cocaine necessary to trigger a mandatory minimum, which primarily affected Black defendants. By the last five years in the data—2013 through 2017—raw racial disparity in mandatory minimums (that is, the amount of space between the trend lines for each group) is much smaller than in the first several years.

⁸⁸ This Figure was produced using the *Commission Datafiles*, *supra* note 2.

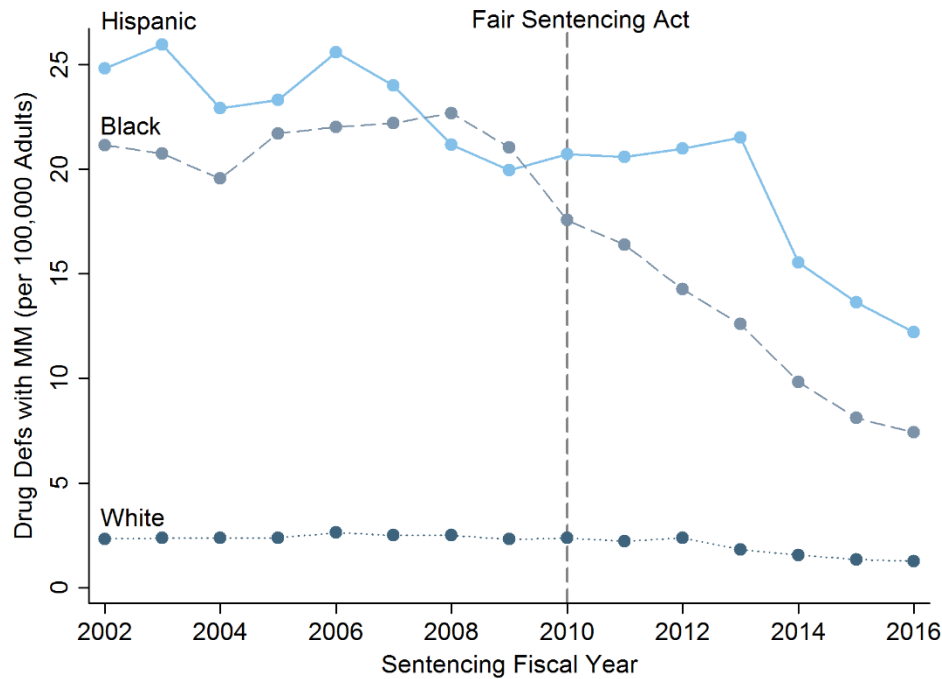


Figure 3. Mandatory Minimum Charging for Federal Drug Defendants as a Proportion of the U.S. Adult Population

Figure 3 plots the number of Black, Hispanic, and White defendants convicted of drug offenses who faced any mandatory minimum, as a proportion of the Black, Hispanic, and White U.S. adult populations.⁸⁹ As a proportion of the White U.S. adult population, White defendants are much less likely to be charged with a federal drug offense carrying a mandatory minimum than Black and Hispanic defendants—only three out of every 100,000 White adults are charged with a mandatory minimum for a federal drug offense each year.

Before the Fair Sentencing Act, Black and Hispanic defendants were charged with drug mandatory minimums roughly seven times as often as White defendants:

⁸⁹ This Figure was produced using the Commission's annual data files, *see id.*, as well as intercensal estimates of the United States adult population. For years 2011 through 2016, these population estimates are from U.S. CENSUS BUREAU, *Monthly Population Estimates by Age, Sex, Race, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2019*, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html> (last visited July 17, 2010). For years 2000 through 2010, these population estimates are from U.S. CENSUS BUREAU, *Intercensal Estimates of the Resident Population by Single Year of Age, Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2000*, <https://www.census.gov/data/datasets/time-series/demo/popest/intercensal-2000-2010-national.html> (last visited July 17, 2020).

around twenty out of every 100,000 Black adults and 22 out of every 100,000 Hispanic adults was charged with a drug mandatory minimum in 2002 through 2009. This trend reversed for Black defendants around or slightly before passage of the Fair Sentencing Act in 2010. By 2016, only ten out of every 100,000 Black adults and 15 out of every 100,000 Hispanic adults were charged with a drug mandatory minimum. Despite these gains, however, Black and Hispanic defendants continue to be overrepresented relative to their share of the U.S. adult population.

It is important to note, however, that these Figures are insufficient to fully understand the consequences of mandatory minimums. The reason is that only looking at cases in which mandatory minimums were charged ignores the important structural ways that mandatory minimums affect criminal sentencing for all drug defendants, as described in the next Part.

III. MANDATORY MINIMUM ENTRENCHMENT

In this Part, I argue that a critical aspect of mandatory minimums in the Controlled Substances Act—and part of what makes them so formidable—is the extent to which they are interconnected with other aspects of the federal criminal process, an institutional framework I call *mandatory minimum entrenchment*. Part III.A presents the concept of mandatory minimum entrenchment. III.B describes a case study that illustrates the power of mandatory minimum entrenchment by documenting the meager sentencing response to a 2013 federal policy change that directed all federal prosecutors to stop charging mandatory minimums against low-level, nonviolent drug defendants.

A. Mandatory Minimums, the Sentencing Guidelines, and Sentencing Outcomes

Understanding the scope of the Act's mandatory minimum provisions presents a challenge. One might start by conceptualizing mandatory minimums as fixed elements—simply applying in some federal criminal cases and not others. In this Part, I argue that this simplistic view of mandatory minimums overlooks the way that these statutory provisions support the larger sentencing framework in which they are entrenched. As a result of this *mandatory minimum entrenchment*, the mandatory minimum provisions of the Controlled Substances Act affect sentences for all defendants convicted of drug offenses—not just those who are formally charged with a mandatory minimum.

Mandatory minimum entrenchment is primarily reinforced by two aspects of federal sentencing: first, that the U.S. Sentencing Guidelines (which apply to *all* defendants convicted of drug offenses) are tethered to the mandatory minimum provisions; and second, that judges and prosecutors are heavily influenced by the Guidelines in deciding sentences and sentencing recommendations.

The most direct way that mandatory minimums affect sentences for drug defendants who are not charged with a mandatory minimum is through the application of the Guidelines. The Act's mandatory minimums and the Guidelines

share a common history. As described in Part II.A, Congress added the first mandatory minimum to the Controlled Substances Act in 1984. That year, Congress also enacted the Sentencing Reform Act, which established the U.S. Sentencing Commission and authorized the Commission to create binding sentencing guidelines (the “Guidelines”). Since their creation, the Guidelines for drug offenses have been explicitly tied to the mandatory minimum provisions of the Act. As the Director of the Federal Judicial Center explained in 1992, “[M]andatory minimum sentencing statutes operate concurrently with the guidelines and, indeed, formed the basis for the Commission’s drug guidelines. It is therefore not possible to disentangle the effects of mandatory minimums from those of the sentencing guidelines.”⁹⁰

Because the Guidelines calibrate to the Act’s mandatory minimums, a person who is not charged with a mandatory minimum, or who avoids one through safety-valve relief or a substantial assistance reduction, will still fall into a Sentencing Guidelines range that reflects (or, nearly reflects)⁹¹ what would have been their mandatory minimum based on the quantity of drugs that can be attributed to them.

As an example, suppose a defendant with no criminal record was charged in 1987 (the first Guidelines year) with possessing with intent to distribute ten grams of cocaine base. This offense violates 21 U.S.C. § 841(B)(i), and in 1987 would have been subject to a mandatory minimum sentence of five years.⁹² The defendant’s Guidelines range would have been calculated under U.S.S.G. § 2D1.1. The defendant’s base offense level would have been determined based on the Drug Quantity Table, which in 1987 would have produced an offense level of 26 based on drug type (cocaine base) and quantity (ten grams).⁹³ If the defendant were in the lowest criminal history category and received no adjustments to the offense level, the defendant’s advisory Guidelines range would have been 63-78 months, just higher than the five-year mandatory minimum triggered by the Act. Recall that at this time the Guidelines were mandatory. Thus, even if the defendant had avoided being subject to the mandatory minimum, they still would have received a sentence of approximately the same length as the mandatory minimum.

Since 1987, the Commission has, with limited success, attempted to reform sentencing of defendants convicted of drug offenses, but has been unwilling to uncouple the Guidelines from the mandatory minimum provisions of the Controlled Substances Act. Before the Fair Sentencing Act was passed in 2010, the Commission’s efforts largely focused on trying to reduce the 100:1 disparity. In 1995, 1997, and 2002, the Commission made proposals to reduce the disparity, but

⁹⁰ William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: The Need for Separate Evaluation*, 4 FED. SENTENCING. REP. 352, 352 (1992).

⁹¹ A drug defendant who receives safety-valve relief will usually receive a two-level reduction in their offense level under U.S.S.G. § 2D1.1(b)(18), which will reduce their Guidelines range by around 25 percent.

⁹² See *supra* note 7 and accompanying text.

⁹³ U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL 2.38 (1987).

Congress rejected these proposals.⁹⁴ In 2007, the Commission acted on its own to amend the Guidelines,⁹⁵ and Congress did not object. The 2007 amendment reduced the base offense levels for drug-trafficking offenses involving cocaine base by two levels, without changing the base offense levels for drug-trafficking offenses involving any other controlled substances.⁹⁶ As a result, after the 2007 Guidelines Amendments, a defendant in the lowest criminal history category and responsible for ten grams of cocaine base (as in the previous paragraph) would earn a base offense level of 24 and fall into a Guidelines range of 51 to 63 months rather than 63 to 78 months.⁹⁷ Critically, the new Guidelines range—although reduced—still encompassed the mandatory minimum, reflecting the Commission’s “recogni[tion] that establishing federal cocaine sentencing policy ultimately is Congress’s prerogative.”⁹⁸ In its report to Congress, the Commission emphasized that it viewed this reduction “only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio.”⁹⁹ When the Fair Sentencing Act passed in 2010 and reduced the crack-powder disparity to 18:1, the Commission again recalibrated the Guidelines to align with the new mandatory minimums.¹⁰⁰

Although the Guidelines are now advisory,¹⁰¹ mandatory minimum entrenchment is further reinforced by prosecutorial and judicial practices and norms of adhering to the Guidelines. For federal prosecutors, for example, this practice is

⁹⁴ Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25075-25077 (May 10, 1995) (proposing a 1:1 ratio); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (Apr. 1997) (proposing a 5:1 ratio) <https://fsr.ucpress.edu/content/ucpfsr/10/4/184.full.pdf>; U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (May 2002), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (proposing reducing the ratio to at least 20:1); Pub. L. No. 104-38 § 1, 109 Stat. 334 (1995) (rejecting the 1995 proposed amendment).

⁹⁵ U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES FOR THE UNITED STATES COURTS, 72 Fed. Reg. 28558, 28571-72 (2007) [hereinafter 2007 GUIDELINES AMENDMENTS].

⁹⁶ *Id.*

⁹⁷ U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(c)(8) (2007).

⁹⁸ 2007 GUIDELINES AMENDMENTS, *supra* note 95, 72 Fed. Reg. at 28573.

⁹⁹ *Id.*

¹⁰⁰ See U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2011). In November 2014, the Commission amended the Guidelines to reduce the base offense level for all drug offenses by two levels. U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES (Nov. 1, 2014), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20140430_Amendments.pdf.

¹⁰¹ *United States v. Booker*, 543 U.S. 220, 258–59 (2005).

formalized in their employee manual, which instructs federal prosecutors to seek sentences within defendants' advisory Guidelines ranges and requires prosecutors to get supervisory approval before requesting an out-of-range sentence.¹⁰²

Judges also are both formally and behaviorally bound to the Guidelines, as described by Justice Souter as the Guidelines' "gravitational pull."¹⁰³ The Supreme Court has required judges to start each sentencing by first calculating the Guidelines' range.¹⁰⁴ Federal district judges likely worry that out-of-range sentences are more likely to be appealed.¹⁰⁵ Many federal circuit courts, for example, hold that within-Guidelines sentences are presumptively reasonable but do not employ the same presumption for sentences outside the Guidelines range.¹⁰⁶ Some federal circuit courts also require judges to explain deviations from the Guidelines, and more significant deviations require more compelling explanations.¹⁰⁷ These rulings from higher courts tacitly compel district judges to sentence within the Guidelines.

Judges might also engage in subconscious anchoring. Anchoring is a known cognitive bias in which a decision-maker—often subconsciously—heavily relies on an initial piece of information when making subsequent decisions. In one famous example, participants watched a wheel spun with numbers from 0 and 100.¹⁰⁸ The volunteers were then asked to adjust that number up or down to indicate how many African countries were members of the United Nations. Participants who spun larger numbers gave larger estimates, while those who spun smaller numbers gave smaller

¹⁰² U.S. DEP'T OF JUSTICE, JUSTICE MANUAL 9-27.730 (2018).

¹⁰³ *Rita v. United States*, 551 U.S. 338, 390 (2007) (Souter, J., dissenting).

¹⁰⁴ *Id.* at 347–48 (2007) (majority opinion).

¹⁰⁵ See, e.g., Stephen J. Choi, Mitu Gulati, & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals*, J. L. ECON. & ORG. 518, 518–19 (2012) ("Reversal is a burden for district judges, requiring them sometimes to conduct new trials and usually to hear new motions, while denying them their preferred outcome. Reversal is also potentially embarrassing and detrimental to a trial judge's prospects for promotion to the appeals courts."); Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 No. 1 J. Legal Stud. 113, 115 (2015) (arguing that "district judges are greatly affected in their decision making by their place at the bottom of the federal judicial hierarchy and their role as agent to their courts of appeals' colleagues.").

¹⁰⁶ The Supreme Court held that federal courts of appeals may apply a non-binding presumption of reasonableness to within-Guidelines sentences in *Rita*, 551 U.S. at 341; *Gall v. United States*, 552 U.S. 38, 51 (2007). Federal courts of appeals may not, however, apply a presumption of unreasonableness to out-of-range sentences. *Gall*, 552 U.S. at 51.

¹⁰⁷ See, e.g., *United States v. Merced*, 603 F.3d 203, 216 (3d Cir. 2010) ("The extent of the explanation we require of the district court may turn on whether the court has varied from the Guidelines range, and, if it has, on the magnitude of the variance."); *United States v. Padilla*, 520 F.3d 766, 775 (7th Cir. 2008) (holding that the more a sentence deviates from the Guidelines range, "the more detailed the district court's explanation must be.").

¹⁰⁸ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974).

estimates, even when they were paid based on their accuracy.¹⁰⁹ In each case, the participants were using the initial number spun on the wheel as an anchor point upon which to base their (completely unrelated) decision. Scholars have long argued that judges similarly are subject to anchoring bias in sentencing, and research of federal sentencing tends to bear out this prediction.¹¹⁰

Overall, prosecutors and judges appear to be deeply tied to the Guidelines, even though they are advisory. The Guidelines therefore create a direct connection between mandatory minimums and all drug defendants, regardless of whether mandatory minimums are actually applied.

B. Case Study: Charging Policies

A recent policy change in federal drug prosecutions illustrates the power of mandatory minimum entrenchment. On August 12, 2013, Attorney General Eric Holder distributed a memo to all federal prosecutors, instructing them to stop charging mandatory minimums for defendants who meet four criteria (the “Holder Memo”).¹¹¹ First, the defendant’s relevant conduct must not have been violent or involved a weapon. Second, the defendant must not have been a leader within a criminal organization. Third, the defendant “[must] not have [had] significant ties to large-scale drug trafficking organizations, gangs, or cartels.” Fourth, the defendant must not have a significant criminal history. The Holder Memo clarified that a “significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.”¹¹²

Prosecutors were able to easily carry out this directive due to *Alleyne v. United States*,¹¹³ a U.S. Supreme Court case decided roughly two months earlier. In *Alleyne*, the Court held that any fact that increases the mandatory minimum sentence for a crime must be submitted to the jury (or pled to beyond a reasonable doubt).¹¹⁴ After

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L. J. 695, 695–96 (2015); Mark W. Bennett, *Confronting Cognitive Anchoring Effect and Blind Spot Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 491 (2014) (finding that judges anchored their sentencing decisions to sentencing recommendations, that were determined by the judge rolling dice); Yang, *Interjudge Disparities*, *supra* note 76 (anchoring to the Guidelines is less intense among judges appointed to the bench after *Booker*).

¹¹¹ Holder Memo, *supra* note 3, at 3.

¹¹² The Holder Memo also instructed prosecutors not to pursue recidivist enhancements under 21 U.S.C. § 851 (2020) “unless the defendant is involved in conduct that makes the case appropriate for severe sanctions.” Holder Memo, *supra* note 3, at 3.

¹¹³ See *Alleyne v. United States*, 133 S.Ct. 2151 (2013).

¹¹⁴ *Alleyne*, 133 S.Ct. at 2162–63.

Alleyne, facts that increase the mandatory minimum could not simply be found by a preponderance of evidence by the judge. Because mandatory minimums in drug cases are triggered by drug type and quantity, Holder’s instruction was simple to carry out—prosecutors could simply *not* allege drug quantity in the indictment and post-*Alleyne*, a defendant in such a case would not be subject to the mandatory minimum. One Assistant United States Attorney explained that “under *Alleyne*, the prosecutor, at the outset [of a case] has *complete control*. He or she must exercise increased discretion in deciding [the] appropriate [allegations], and therefore regulates when the enhanced mandatory punishment is available.”¹¹⁵

The Holder Memo’s explicit goal was to “ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers,” and argued that for low-level, nonviolent drug defendants, mandatory minimum sentences do not serve the traditional purposes of punishment, including public safety, deterrence, and rehabilitation. Figure 1 suggests, however, that the Holder Memo did not work as intended. Although mandatory minimum charging (the dark blue dotted line) plummeted after the Memo was promulgated in 2013, average sentence length (the light blue solid line) only slightly decreased. In contrast, prior to the Memo’s circulation, these two trends—mandatory minimum charging and average sentence length—moved almost perfectly in tandem.

In other work, I carefully explore this phenomenon.¹¹⁶ I show that immediately after the Holder Memo was promulgated, mandatory minimum charging sharply fell for drug defendants likely to be eligible for leniency under the Memo, while remaining largely stable for drug defendants likely to be ineligible under the Memo and federal defendants not charged with drug offenses. Figure 4 demonstrates these trends and constitutes evidence of substantial, although imperfect, *compliance* with the Holder Memo.

¹¹⁵ Robert A. Zauzmer, *The Legal Basis and Need for the Smart on Crime Initiative*, 63 U.S. ATT’YS’ BULL. 3, 5 (Jan. 2015) (emphasis added).

¹¹⁶ Stephanie Holmes Didwania, *Mandatory Minimums and Federal Sentences* (Temple Univ. Beasley School of Law Research Paper No. 2020-01) (Oct. 24, 2020), <https://ssrn.com/abstract=3556138#>.

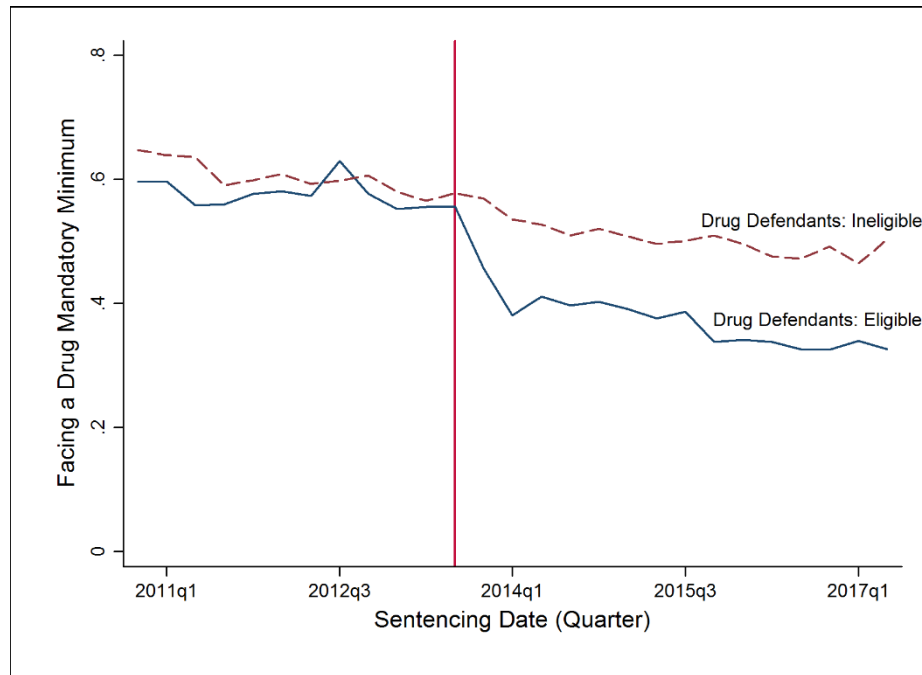


Figure 4. Drug Mandatory Minimums Before/After the Holder Memo¹¹⁷

In contrast, I find little evidence that the Memo was effective at achieving its primary goal—to significantly reduce sentences in the eligible group. Figure 5 presents evidence of the Memo’s *efficacy*—the extent to which it appears to have reduced sentences for eligible defendants. For ineligible defendants (red lines), the average statutory minimum (dashed line) and average sentence trends (solid line) are roughly parallel in both the period leading up to the Holder Memo and the period following. Statutory minimums and sentences appear to slightly decrease in the period after the Memo takes effect, but this trend might have started around the fourth quarter of 2012. Because the Memo was not designed to alter charging behavior for ineligible defendants, the lack of change post-Memo is consistent with what one would expect. Among eligible defendants (blue lines), the relationship between the average statutory minimum and average sentence length is more complicated. In the period before the Holder Memo was distributed, average sentence length (solid line) and average statutory minimums (dashed line) move in tandem. After the Memo is distributed, however, the average statutory minimum falls, but the average sentence length remains quite flat. This suggests that the charging policy failed to achieve its stated goal—to reduce sentence length in the eligible population.

¹¹⁷ *Id.* at 18.

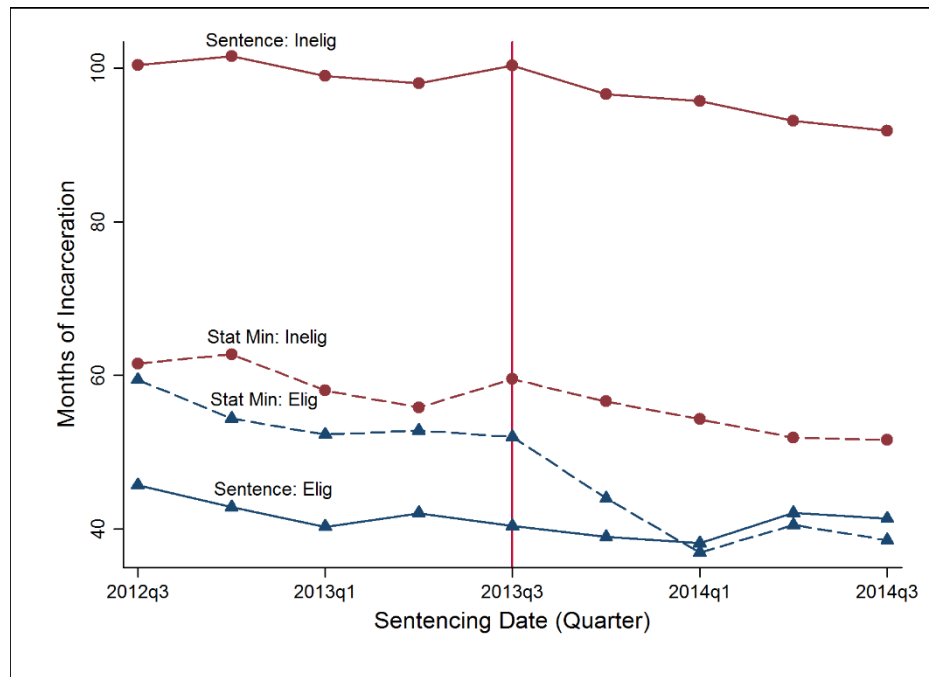


Figure 5. Average Sentence Length and Statutory Minima Before/After the Holder Memo¹¹⁸

This case study suggests that mandatory minimums on their own are not as important a driver of sentence length as one might expect. Even after eliminating mandatory minimum charges for many low-level defendants in August 2013, sentences in this group remained largely unchanged in the months that followed.

There are two related forces at work that explain this outcome. The first is mandatory minimum entrenchment. The Holder Memo made clear that even though prosecutors were to stop charging mandatory minimums, they were instructed not to make any other changes to the way they prosecute cases. In particular, the Memo instructed prosecutors to “be candid with the court . . . including the quantity of drugs involved in the offense and the quantity attributable to the defendant’s role in the offense, even if the charging document lacks such specificity.”¹¹⁹ Similarly, the Memo told prosecutors to “accurately calculate the sentencing range under the United States Sentencing Guidelines.”¹²⁰ In other words, the Holder Memo created

¹¹⁸ *Id.* at 20.

¹¹⁹ Holder Memo, *supra* note 3, at 3.

¹²⁰ It appears that prosecutors complied with these instructions—the average base offense levels, reported quantities of drugs, and average Guidelines ranges did not change in response to the Holder Memo. *See* Didwania, *supra* note 116.

a regime in which mandatory minimum charges were carefully extricated from many prosecutions but the remaining sentencing infrastructure—itsself built around and reinforced by the mandatory minimums, as described in Part III.A—remained.¹²¹

Importantly, the Guidelines are tied to the mandatory minimum regardless of whether it is actually charged, and regardless of whether the defendant actually faces a minimum. Thus, judges and prosecutors—faithful to the Guidelines as described in the previous subsection—imposed similar sentences as in the pre-Memo period. This finding has policy implications discussed below but also provides evidence of the power of entrenchment.

Another reason that the Holder Memo appears to have been largely ineffective at reducing sentences for eligible defendants is that many such defendants received below-mandatory minimum sentences in the pre-period via the substantial assistance and safety-valve reductions. Figure 5 demonstrates that for eligible defendants (blue lines), the average sentence length (solid line) is less than the average statutory minimum (dashed line) in the pre-period. This means that, on average, the eligible defendant's actual sentence length was less than the applicable mandatory minimum. In other words, the leniency offered by the Holder Memo was redundant of other forms of leniency that already existed.

IV. REFORMING MANDATORY MINIMUMS IN THE CONTROLLED SUBSTANCES ACT

Mandatory minimums are among the most heavily criticized provisions of the Controlled Substances Act. However, as described in Part III, they are deeply entrenched in federal sentencing. The Act's mandatory minimums are linked to the U.S. Sentencing Commission's drug guidelines such that even if a prosecutor chooses not to charge a mandatory minimum, a defendant's Guidelines range will reflect the mandatory minimum. Prosecutors and judges are both formally and behaviorally anchored to the Guidelines. This Part argues that the best path forward is for Congress to amend the Act to reduce or eliminate mandatory minimums, and for the Commission to uncouple the Guidelines from the Act's mandatory minimum provisions.

First, Congress should consider reducing or eliminating mandatory minimums for the reasons described in Part II.D: mandatory minimums impose unduly harsh sentences on many defendants, they are disproportionately applied against people (especially men) of color, and they create objectionable power dynamics between judges, prosecutors, defense counsel, and defendants. Empirical evidence suggests that the long prison sentences generated by mandatory minimums are not necessary

¹²¹ To the extent that prosecutors use the threat of a mandatory minimum to induce cooperation or guilty pleas, *see infra* note 81, it is also possible that this dynamic continued to exist after the Holder Memo took effect.

for deterrence, and public opinion is now hostile toward mandatory minimums, which suggests reform could be possible.¹²²

Because these statutory provisions are the root of entrenchment, eliminating the mandatory minimums would destabilize many aspects of federal sentencing for defendants convicted of drug offenses. Not only would eliminating or reducing mandatory minimums reduce unduly harsh sentences in cases in which they are charged, this legislative action would very likely prompt the U.S. Sentencing Commission to create new drug guidelines. Given the Commission's consistent criticism of mandatory minimums and its statements that it ties its drug guidelines to the mandatory minimums because it believes sentencing policy is Congress's prerogative, it seems extremely likely that, without mandatory minimums, the Commission would draft new guidelines for drug offenses that rely on empirical evidence and learned experience. If mandatory minimums were reduced but not eliminated, it is nearly certain that the Commission would adjust the drug guidelines down to reflect the mandatory minimums, as they have always done when mandatory minimums have changed. This reduction would therefore benefit all defendants convicted of drug crimes, not just defendants charged with mandatory minimums.

Lawmakers might worry that a retreat from mandatory minimums would usher in a wave of unfettered discretion for judges, potentially leading to unwarranted disparity between similarly situated defendants. However, this worry is unlikely to take hold. This concern might have been plausible in 1986, when the Act's mandatory minimums were first enacted and the U.S. Sentencing Commission had not yet issued its first Guidelines.¹²³ If mandatory minimums were reduced or eliminated today, however, the entire Guidelines regime would remain, which provides a check on judicial discretion. It is worth also noting that the vast majority

¹²² See e.g., *Voters Want Big Changes in Federal Sentencing, Prison System*, PEW (Feb. 12, 2016), <https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system> (nearly 80 percent of registered voters favor eliminating mandatory minimum sentences for drug offenses). Democratic presidential candidate Joe Biden, an original champion of mandatory minimums in the 1986 Act, now supports eliminating mandatory minimums. Joe Biden for President: Official Campaign Website, *Joe Biden's Criminal Justice Policy*, <https://joebiden.com/justice/> ("Biden supports an end to mandatory minimums. As president, he will work for the passage of legislation to repeal mandatory minimums at the federal level. And, he will give states incentives to repeal their mandatory minimums."). President Donald Trump has not expressed support for eliminating mandatory minimums, but did sign into law the First Step Act, *supra* note 50, which expanded the safety-valve to reach more defendants and shortened some mandatory minimum sentences.

¹²³ The Commission's first Sentencing Guidelines went into effect in November 1987, more than a year after the bulk of the Act's mandatory minimums were added.

of federal criminal offenses do not contain a statutory minimum. There is no good reason to treat drug offenses so differently.¹²⁴

In the alternative, if Congress does not amend the Act, the Commission might consider uncoupling the Guidelines from the Act's mandatory minimum provisions, a change that most federal judges would likely support.¹²⁵ The Commission made progress on this front with the 2014 drug guidelines Amendments, which reduced the base offense levels by two levels for all drug types. However, the Amendment "[e]nsure[d] the guideline penalties remain[ed] consistent with existing five- and ten-year statutory mandatory minimum drug penalties by structuring the Drug Quantity Table."¹²⁶

A bolder change by the Commission is likely necessary to meaningfully reduce sentence length for drug trafficking defendants. Such a move would be well within the Commission's congressional mandate, which instructs the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first defendant who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury."¹²⁷ As the Court described in *Kimbrough*, "The crack cocaine Guidelines... do not exemplify the Commission's exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses... the Commission looked to the mandatory minimum sentences set in the 1986 Act and did not take account of 'empirical data and national experience.'"¹²⁸ Today, the evidence suggests that the Commission has not fulfilled this worthy instruction.

¹²⁴ In fact, Congress occasionally directs the Sentencing Commission to calibrate the Guidelines to be near the statutory maximum for some defendants (*see, e.g.*, 28 U.S.C. § 994(h) (2006)), but Congress gives the Commission no such instruction when it comes to federal drug offenses.

¹²⁵ According to a 2010 survey of federal district judges (the most recent year survey information is available), 58% agreed with the statement "The sentencing guidelines should be 'de-linked' from statutory mandatory minimum sentences (i.e., the guideline ranges should be set by the Commission independently from mandatory minimum sentences)." Thirty-four percent "strongly" agreed, and 24% "somewhat" agreed. Nineteen percent of federal district judges were "neutral" about the statement, 14% "somewhat" disagreed and just six percent "strongly disagreed." 2010 SURVEY, *supra* note 71.

¹²⁶ U.S. SENTENCING COMM'N, *U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences* (Apr. 10, 2014), <https://www.ussc.gov/about/news/press-releases/april-10-2014>.

¹²⁷ 28 U.S.C. § 994(j) (2020).

¹²⁸ *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).


Appendix A



Office of the Attorney General
Washington, D. C. 20530

August 12, 2013

MEMORANDUM TO THE UNITED STATES ATTORNEYS AND
ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION

FROM: THE ATTORNEY GENERAL 

SUBJECT: Department Policy on Charging Mandatory Minimum Sentences
and Recidivist Enhancements in Certain Drug Cases

In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Supreme Court held that any fact that increases the statutory mandatory minimum sentence is an element of the crime that must be submitted to the jury and found beyond a reasonable doubt. This means that for a defendant to be subject to a mandatory minimum sentence, prosecutors must ensure that the charging document includes those elements of the crime that trigger the statutory minimum penalty.

The Supreme Court's decision in *Alleyne* heightens the role a prosecutor plays in determining whether a defendant is subject to a mandatory minimum sentence. To be sure, the exercise of discretion over charging decisions has always been an "integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and is among the most important duties of a federal prosecutor. Current policy requires prosecutors to conduct an individualized assessment of the extent to which charges fit the specific circumstances of the case, are consistent with the purpose of the federal criminal code, and maximize the impact of federal resources on crime. When making these individualized assessments, prosecutors must take into account numerous factors, such as the defendant's conduct and criminal history and the circumstances relating to the commission of the offense, the needs of the communities we serve, and federal resources and priorities.¹ Now that our charging decisions also affect when a defendant is subject to a mandatory minimum sentence, prosecutors must evaluate these factors in an equally thoughtful and reasoned manner.

It is with full consideration of these factors that we now refine our charging policy regarding mandatory minimums for certain nonviolent, low-level drug offenders. We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution. Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation. Moreover, rising prison costs have resulted in reduced spending on criminal justice initiatives, including spending on law enforcement agents, prosecutors, and prevention and intervention programs. These reductions in public safety spending require us to make our public safety expenditures smarter and more productive.

¹ These factors are set out more fully in my memorandum of May 19, 2010 ("Department Policy on Charging and Sentencing") and Title 9 of the U.S. Attorneys' Manual, Chapter 27.

Memorandum to the United States Attorneys and
Assistant Attorney General for the Criminal Division

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For all these reasons, I am issuing the following policy²:

Continuation of Charging and Sentencing Policies: Pursuant to my memorandum of May 19, 2010, prosecutors should continue to conduct “an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime.” While this means that prosecutors “should ordinarily charge the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction,” the charges always should reflect an individualized assessment and fairly represent the defendant’s criminal conduct.

Certain Mandatory Minimum Sentencing Statutes Based on Drug Quantity: Prosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement. However, in cases involving the applicability of Title 21 mandatory minimum sentences based on drug type and quantity, prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets each of the following criteria:³

- The defendant’s relevant conduct does not involve the use of violence, the credible threat of violence, the possession of a weapon, the trafficking of drugs to or with minors, or the death or serious bodily injury of any person;
- The defendant is not an organizer, leader, manager or supervisor of others within a criminal organization;
- The defendant does not have significant ties to large-scale drug trafficking organizations, gangs, or cartels; and
- The defendant does not have a significant criminal history. A significant criminal history will normally be evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions.

Timing and Plea Agreements: If information sufficient to determine that a defendant meets the above criteria is available at the time initial charges are filed, prosecutors should decline to pursue charges triggering a mandatory minimum sentence. However, if this information is not yet available, prosecutors may file charges involving these mandatory minimum statutes pending further information and a determination as to whether a defendant meets the above criteria. If the defendant ultimately meets the criteria, prosecutors should pursue a disposition that does not require a Title 21 mandatory minimum sentence. For example, a prosecutor could ask the grand jury to supersede the indictment with charges that do not trigger the mandatory minimum, or a defendant could plead guilty to a lesser included offense, or waive indictment and plead guilty to a superseding information that does not charge the quantity necessary to trigger the mandatory minimum.

² The policy set forth herein is not intended to create or confer any rights, privileges, or benefits in any matter, case, or proceeding. See *United States v. Caceres*, 440 U.S. 741 (1979).

³ As with every case, prosecutors should determine, as a threshold matter, whether a case serves a substantial federal interest. In some cases, satisfaction of the above criteria meant for low-level, nonviolent drug offenders may indicate that prosecution would not serve a substantial federal interest and that the case should not be brought federally.

Memorandum to the United States Attorneys and
Assistant Attorney General for the Criminal Division

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Advocacy at Sentencing: Prosecutors must be candid with the court, probation, and the public as to the full extent of the defendant's culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant's role in the offense, even if the charging document lacks such specificity. Prosecutors also should continue to accurately calculate the sentencing range under the United States Sentencing Guidelines. In cases where the properly calculated guideline range meets or exceeds the mandatory minimum, prosecutors should consider whether a below-guidelines sentence is sufficient to satisfy the purposes of sentencing as set forth in 18 U.S.C. § 3553(a). In determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense or offenses that were part of the same course of conduct, common scheme, or plan.

Recidivist Enhancements: Prosecutors should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions. When determining whether an enhancement is appropriate, prosecutors should consider the following factors:

- Whether the defendant was an organizer, leader, manager or supervisor of others within a criminal organization;
- Whether the defendant was involved in the use or threat of violence in connection with the offense;
- The nature of the defendant's criminal history, including any prior history of violent conduct or recent prior convictions for serious offenses;
- Whether the defendant has significant ties to large-scale drug trafficking organizations, gangs, or cartels;
- Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants; and
- Other case-specific aggravating or mitigating factors.

In keeping with current policy, prosecutors are reminded that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution, the guidance provided by my May 19, 2010 memorandum, and the policy outlined in this memorandum.